

**PUBLIC INTEGRITY COMMISSION
MINUTES
May 21, 2019
10:15 A.M.**

1. Call to Order: 10:15 a.m. Present: William F. Tobin, Jr. (Vice-Chair--Acting Chair); Michele Whetzel (Vice-Chair); Commissioners: Andrew Gonser, Esq., Kyle Gay, Esq.; Commission Counsel, Deborah J. Moreau, Esq.

2. Approval of Minutes for April 16, 2019: Moved—Commissioner Whetzel; seconded—Commissioner Gonser. Vote 4-0, approved.

3. Administrative Items

ID cards—Meeting scheduled with lobbyists on May 23rd to discuss objections about the proposed legislation.

4. Motion to go into Executive Sessionⁱ and Requests for Advisory Opinions, Waivers and Referrals: Moved—Commissioner Whetzel; seconded Commissioner Gay. Vote 4-0, approved.

5. 19-20—Outside Employment

[Employee] began working for the State on March 4, 2018. She worked for a Division of the Department of Children, Youth and their Families (“DSCYF”). Her job duties included: interviewing clients and family members to gather background information and make referrals for services; assessing progress; collaborating with schools, doctors and other providers to set goals and measure the client’s progress.

[Employee] was offered a part-time position by her former employer, [a private entity]. [The private entity] offered various group and individual programs to help children [develop specific skills]. [The private entity] did not contract with the State but they did have some clients that were in the Medicaid program. At the time of the meeting, none of [the private entity]’s clients were active with [the Division]. [Employee was expected to] train new staff members in various skills such as: parent interaction; setting and assessing goals and intake procedures. [Employee] would be able to accomplish her training objectives through the use of cameras. The use of cameras would allow her to reference particular activities or behaviors without having one-on-one contact with [the private entity]’s clients. To further separate her part-time job duties from her State job duties, [Employee] decided that she would not work in any programs that received state funding.

[Employee] discussed the job offer with her State supervisor. [The Supervisor] agreed to allow [Employee] to recuse herself from handling a case in which [Employee] had prior knowledge of the client from her work at [the private entity]. Likewise, the owner of [the private entity] agreed that [Employee] would not be required to perform tasks that would conflict with [Employee]’s State job duties.

[Employee] asked the Commission if her part-time work for [the private entity] created a conflict of interest with her State job duties.

A. Under 29 Del. C. § 5806(b), State employees may not accept other employment if acceptance may result in:

(1) impaired judgment in performing official duties:

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). It seemed unlikely that [Employee] would encounter any of her State clients while performing her [private] job duties because she would not be working with individual clients. Conversely, her State supervisor had agreed to allow [Employee] to recuse herself from working with any client that [Employee] had previously encountered at [the private entity]. Those recusal strategies would allow her to perform her [private] job duties without affecting her professional judgment in the performance of her State job duties.

(2) preferential treatment to any person:

The next concern addressed by the statute is to insure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] could not represent or assist her private interest before her own agency. It appeared highly unlikely that [Employee] would be required to represent her part-time employer before the State because [the private entity] did not contract with the State. Consequently, it was equally unlikely that she would place her co-workers in a position to make decisions which could result in preferential treatment to anyone.

(3) official decisions outside official channels:

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say she would do so, she was entitled to a strong presumption of honesty and integrity.

(4) any adverse effect on the public's confidence in the integrity of its government:

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation the Commission treats this provision as an appearance of impropriety standard. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality.

The fact that [the private entity] did not contract with the State practically eliminated the possibility that [Employee]'s dual employment would create an appearance of impropriety amongst the public.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. One prohibition considered by the Commission under that provision was

the State employee could not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee]'s part-time employment would be in the evenings, after her State work hours.

Motion—[Employee]'s part-time employment with [the private entity] would not create a conflict of interest with her State job duties as long as she recused as necessary. Moved—Commissioner Gay; seconded—Commissioner Gonser. Vote 4-0, approved.

6. 19-18– Post Employment and Outside Employment

[Employee] was a casual/seasonal worker in [a specific program which was overseen by two Divisions within] the Department of Health and Social Services (“DHSS”).

The [Program provided information about services available to parents of children with specific needs. The goal of the program was early intervention to improve client outcomes]. [Division 1 staff] provided assessments, service coordination and referrals to services. Eligibility was based on diagnosis, not on the family's income. The [Division 2 staff] provided overall management for the system and ensured that the program was meeting federal guidelines. [Division 2 staff] also wrote division policies and provided training to those working in the [Program].

[Employee] was hired by [Division 1] to provide clinical services and she also worked for [Division 2] on the administrative side of the [Program]. A contract between [Division 1] and a [private entity] included a provision that [the private entity] would fund the clinical position. In the past, [Division 1] had always funded the position. As of July 1st, [Division 1] would no longer fund the clinical position and [Employee] would only be working part-time for [Division 2] on the administrative side of the [Program].

[Employee] was offered a part-time position with [the private entity] to continue to work in the clinical position that was previously funded by [Division 1]. If she accepted the position, she would work part-time for [Division 2] and part-time for [the private entity]. She asked the Commission if she could accept the offer from [the private entity] without violating the Code of Conduct.

POST-EMPLOYMENT

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State.

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand

their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. Similarly, the Commission has held that the facts must overlap substantially.

To determine if there was substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter, the [Program], while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts.

[Employee] would be working in the private sector performing the same work she was doing as a State employee and working in the same location. However, there was an important distinction in this post-employment matter. [Employee] did not voluntarily leave her employment in the [Program]. The State’s subsidy of the clinical position was eliminated and as a result, so were a part of [Employee]’s job duties. The contract between [Division 1] and [the private entity] required [the private entity] to pay the salary of whomever was hired to fill the position. Unsurprisingly, they wanted to hire a person who was already familiar with the job duties and was familiar with the [Program].

Enforcement of post-employment restriction must be predicated on protecting a valid government interest. In this case, enforcement of the post-employment restriction would not be a valid restraint on [Employee]’s ability to seek other employment because the State no longer had a viable interest in the clinical side of the [Program]. Otherwise stated, it was a condition precedent to the enforcement of a post-employment restriction to prove that the restraint sought was reasonably necessary for the protection of an interest. The State’s interest in enforcing the post-employment restriction was to prevent a situation in which State-sponsored skills training was taken to the private sector. In this case, the State withdrew from the role of service provider leaving [Employee] with fewer job duties.

As a result of the foregoing, the Commission decided that it would not violate the post-employment restriction in the Code of Conduct for [Employee] to accept employment with [the private entity] to provide clinical services in support of the [Program].

OUTSIDE EMPLOYMENT

The Commission next considered whether [Employee]’s employment with [the private entity] would create a conflict of interest with her remaining State job duties.

A. Under 29 Del. C. § 5806(b), State employees may not accept other employment if acceptance may result in:

(1) impaired judgment in performing official duties:

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. [Division 2] developed policies to ensure that [Division 1] was in compliance with existing state and federal laws, providing a distinct separation between [Employee]'s two sets of job duties. Furthermore, [Division 2] was not involved in the direct care of patients in the [Program]. As a result, the Commission could not see how [Employee]'s dual employment would have an adverse effect on her professional judgment while performing her State job duties.

(2) preferential treatment to any person:

The next concern addressed by the statute is to insure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] could not represent or assist her private interest before her own agency. As stated above, her clinical job duties would not require [Employee] to represent [the private entity] before [Division 2]. Her two roles had distinct and separate duties and goals. Therefore, the likelihood that she would be able to show preferential treatment to any person was greatly diminished.

(3) official decisions outside official channels:

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say she would do so, she was entitled to a strong presumption of honesty and integrity.

(4) any adverse effect on the public's confidence in the integrity of its government:

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation the Commission treats this provision as an appearance of impropriety standard. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State job duties could not be performed with honesty, integrity and impartiality. Ordinarily, [Employee]'s employment with [the private entity], in a position she previously held while paid by the State, would cause some members of the public to question whether she used her State position to benefit herself financially. However, in this context, the State had freely relinquished its responsibility for funding the clinical position. The fact that the State now required [the private entity], an entity not subsidized by taxpayer dollars, to fund the position would mitigate any appearance of impropriety.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. One prohibition considered by the Commission under that provision was that the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee]'s State position was classified as part-time casual/seasonal leaving plenty of time during normal work hours for her to also work part-time for [the private entity]. In addition, it would likely be impossible for [Employee] to perform her clinical job duties while working in her State position.

Motion—[Employee]’s part-time work for [the private entity] did not violate the post-employment or the outside employment restrictions in the Code of Conduct. Moved—Commissioner Whetzel; seconded—Commissioner Gay. Vote 4-0, approved.

7. 19-19—Private Interest

On April 5, 2019, Commission Counsel received an email from an employee of the State Auditor’s Office. The Auditor’s Office had received an anonymous tip on the ‘fraud hotline’ that [an employee of a school district] had awarded a school contract to her brother-in-law’s employer. Commission Counsel contacted the school district’s attorney and he stated he would respond after he had a chance to look into the matter.

Subsequently, [the attorney] verified that the school district had awarded a contract to the brother-in-law’s employer and also stated that at the time the contract was under consideration by the school board, [Employee] had disclosed the fact that her brother-in-law worked for [the private company]. He then stated that the award of the contract could not be a conflict of interest because the term ‘brother-in-law’ was not defined as a “close relative” in the Code of Conduct. Commission Counsel responded to [the attorney] that not all conflicts of interest were defined by family relationship and that as a matter of ‘fact’ [Employee] could have violated the Code of Conduct. Commission Counsel then offered [Employee] an opportunity to seek an advisory opinion.

[Employee], through [the attorney], declined an advisory opinion. However, she did submit a written statement and provided records which documented the process by which [the private company] was awarded the contract.

The Commission considered what course of action to pursue in the matter. [Employee] had declined an advisory opinion. If the Commission was satisfied with the documentation [Employee] provided, Commission Counsel recommended no further action. If the Commission was not satisfied that [Employee] had addressed the issue appropriately, the only other option would be for the Commission to self-initiate a Complaint and set the matter down for a hearing.

A. District employees may not review or dispose of State matters if they have a personal or private interest that may tend to impair judgment in performing official duties.

[Employee] had a private interest when she made the decision to award the contract to [the private company]. She believed that her official judgment was not affected by the fact that her brother-in-law was employed by the company that won the contract. She first pointed to the fact that she obtained three bids for the contract despite not being required to do so by the Office of Management and Budget’s rules. [The private company] did submit the lowest bid. It was also clear that the district’s former contractor was not complying with the terms of their maintenance agreement and they were double-billing for their services.

B. District employees may not represent or otherwise assist a private enterprise on matters before the agency with which they are associated by employment.

District employees are not to deal with their own board to insure decisions by their colleagues and coworkers are not unduly influenced by another employee’s connection to the private enterprise.

Delaware Courts have addressed the concern when that occurs. In that case, an appointee to DNREC's Fish and Wildlife Advisory Council, which was under the Fish and Wildlife Division, sought to contract with the Division on matters where the Division had specific authority and responsibility. The Cabinet Secretary declined to contract with him, even though the contract was publicly noticed and bid, and even though he was the lowest bidder. The Secretary was concerned about the close association between the appointee and the Division and wanted to "avoid any allegation or suggestion of undue influence in the letting of contracts by this Department." The Court noted at that time that the State had no specific conflict of interest law. It also noted that there was nothing in the record to show that the State official secured the contract as the result of anything other than submitting the lowest responsible bidder, but it approved the Secretary's action saying: "the award of contracts for public works has been suspect, often because of alleged favoritism, undue influence, conflicts and the like" and "it is vital that a public agency have the confidence of the people it services and, for this reason, it must avoid not only evil but the appearance of evil as well." Three years later, a Code of Conduct was passed that included the bar against State employees, and appointees to an agency's Boards or Commissions, dealing with their own agency, and it was deemed one of the provisions the General Assembly found "to be so vital" that it carried a criminal penalty.

[Employee] discussed her family connection to [the private company] during the board's executive session in October 2018. As a result, it was impossible to tell if [Employee] advocated for [the private company] or merely presented the bids to the board and they selected the lowest bidder. The Commission decided to close the matter because of the documentation provided by [Employee].

Motion—No action in this matter. Moved—Commissioner Gonser; seconded—Commissioner Whetzel. Vote 4-0, approved.

8. Motion to go out of Executive Session: Moved—Commissioner Gay; seconded—Commissioner Gonser. Vote 4-0, approved.

9. Adjournment

ⁱ Pursuant to 29 Del. C. § 10004(6) to discuss non-public records (29 Del. C. § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to the confidentiality standards in 29 Del. C. § 5805(f), 29 Del. C. § 5807(d) Advisory Opinion Requests, and 29 Del. C. § 5810(h) for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the applicant for the advisory opinion requests a public meeting, 29 Del. C. § 5805(f), 29 Del. C. § 5807(d), or the person charged in a complaint requests a public meeting. 29 Del. C. § 5810(h). No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.